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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

v

ANDREW McBRIDE, GLENN BENSON AND RICHARD BARRY

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Before Higgins LJ, Girvan LJ and Coghlin LJ

COGHLIN LJ (delivering the judgment of the court)

Introduction

[1] The appellants, Andrew McBride, Glenn Benson and Richard Barry were each convicted of the offence of blackmail, contrary to Section 20 of the Theft Act (Northern Ireland) 1969 by the Deputy Recorder of Belfast, Her Honour Judge Philpott, on 3 May 2013. On 2 July 2013 Richard Barry received a sentence of 9 years' imprisonment (4.5 years in custody and 4.5 years on licence), Glenn Benson received a sentence of 8 years' imprisonment (4 years in custody and 4 years on licence) and Andrew McBride received a sentence of 7 years' imprisonment (3.5 years in custody and 3.5 years on licence). Before this court Richard Barry was represented by Mr Grant QC and Mr Michael Duffy while Mr Paul Ramsey QC and Mr Christopher Holmes appeared for Glenn Benson and Mr Frank O'Donoghue QC and Mr Mark Farrell represented the appellant, Andrew McBride. Mr Philip Mateer QC and Mr Ian Tannahill appeared on behalf of the Director of Public Prosecutions. The court is grateful to all sets of counsel for their carefully prepared and succinctly delivered written and oral submissions.

The Factual Background

[2] The factual background to the offences has been set out in some detail in the judgment of this court delivered on the 2nd day of May 2014 in relation to the appeal against conviction prosecuted by Andrew McBride and the Court would refer to that judgment with regard to the involvement of that appellant – see R v McBride [2014] NICA 35.

[3] The Crown case was that Richard Barry and Glenn Benson were two of the three individuals who called at the premises occupied by Witness A and Witness B on 16 September 2009 behaving in an aggressive and threatening manner. Witness A gave evidence that he recognised Glenn Benson who was swearing and telling Witness A that he would be shot if he did not comply with their demands for money. He demanded that a payment schedule should be worked out. The Learned Trial Judge found as a fact that Glenn Benson was one of the three men who called at the house occupied by Witness A and Witness B and subjected Witness A to threats and menaces for the purpose of extracting money from him and that there was strong indication that Mr Barry was "an organiser". Mr Barry was arrested by the police in the course of counting some of the money extracted from Witness A in the Ivy Bar. During the course of subjecting Witness A and Witness B to threats and intimidation the men who called at their house on 16 September represented that they were from "West Belfast UDA".

[4] Prior to the visitation by the three individuals on 16 September Witness A had been subjected to similar threats by an individual named Martin Fleming. As recorded at paragraph [4] of our earlier judgment Mr Fleming had called at the house occupied by Witness A earlier in September representing that he had been sent by the "Glenburn UDA" and stating that he, Witness A, would be fined £10,000 by that organisation if he did not supply cannabis.

[5] Martin Fleming was tried on a separate indictment containing a single count alleging that he made an unwarranted demand with menaces contrary to Section 20 of the Theft Act (Northern Ireland) 1969. The Learned Trial Judge was clearly concerned about the appropriate sentence to impose upon Martin Fleming and she arranged for a number of further enquiries to be made including the provision of a medical report from Dr Caldwell dealing with the condition of Mr Fleming's partner. Further hearings took place on 1 and 4 July 2013. It appears that on 19 September 2012 Mr Fleming's partner had sustained a cardiac arrest which had resulted in a hypoxic brain injury necessitating her admission to the Brain Injury Unit at Musgrave Park Hospital on 20 November 2012. She remained as an inpatient in a low state of semi-coma totally dependent upon full nursing care at the time of the hearings conducted by the Learned Trial Judge. At that time Martin Fleming's 16-year-old daughter and 22-year-old son remained in the family home together with a 16-year-old nephew. In addition to the social workers concerned with the family, the Learned Trial Judge arranged for both children to give oral evidence as to their current situation during the hearing on 13 September 2013. Prior to receiving his sentence Martin Fleming visited his wife every day and the children also visited her upon a regular basis. According to the probation report available for the court it would take approximately 18 months to 2 years to arrange circumstances under which Martin Fleming's partner might be able to return to the family house.

[6] After completing the various enquiries and the oral evidence of the witnesses the Learned Trial Judge sentenced Martin Fleming on 13 September 2013. In so doing she made the following observations:

> "In my view, he (Martin Fleming) cannot receive a sentence lesser than that of Mr Walsh. So I am sentencing you to 5 years' imprisonment but because of your family circumstances, and the delay it has taken from 2009 to get this case to court, and the fact that while these proceedings were pending your wife took seriously ill, so it is not the case that you went out and committed this offence while she was ill. This offence occurred afterwards. And for these reasons I am not making the 50/50 split, which would be usual, which would be 2½ years in custody and 2½ years on licence. Because of the delay in the case reaching court, because of your wife's illness, because of the burden that is going to be on your children while you are in custody, I am going to reduce the custody level from 2½ years to one of 18 months."

The submissions advanced on behalf of the appellants

[7] Mr Grant acknowledged that the application for leave to appeal on behalf of Richard Barry was out of time and sought an Order from this court extending the time for lodging Notice of Appeal in accordance with Section 16(2) of the Criminal Appeal (Northern Ireland) Act 1980 ("the 1980 Act"). Insofar as the appellants were concerned the relevant sequence of events was as follows:

(i) The three appellants, together with Mr Fleming and Mr Walsh, were convicted by the Learned Trial Judge on 3 May 2013 and the three appellants, together with Mr Walsh, were sentenced on 2 August 2013.

(ii) Mr Fleming was not sentenced until 13 September 2013.

(iii) On 28 November 2013 the appellant Barry consulted with his legal representatives and a decision was reached not to appeal his sentence.

(iv) Andrew McBride gave Notice of an Appeal against both conviction and sentence on 10 July 2013 and Glenn Benson sought leave to appeal against sentence on 10 October 2013.

[8] Whether to extend the time for lodging a Notice of Appeal or application for leave to appeal is a matter for the discretion of this court and we note that in the case of R v Winchester [1978] 3 NIJB Lord Lowry LCJ observed with typical economy and wisdom:

> "I need not dilate on the principles governing an extension of time. It is not obtained for the asking, but the most important point is that justice should not be sacrificed to procedure and convenience. The potential merits of an appeal are relevant but not paramount."

In R v Bell [1978] 5 NIJB Carswell J delivering the judgment of this court noted that:

> "The Court of Appeal has power to extend the time if it thinks fit, but substantial grounds must be given to account for the delay before it will exercise its power. One of the factors to be taken into account is the likelihood of success in the appeal if the extension is granted: see R v March 25 Cr App Rep 49, where it was said to be the rule and practice not to grant any considerable extension of time unless the court was satisfied that there were such merits that the appeal would probably succeed."

[9] While he accepted that the applicant had originally decided not to appeal against his sentence and that, essentially, the only explanation for the late lodging of the Notice was a "change of mind" by the applicant, Mr Grant drew our attention to the observations of Chief Justice O'Higgins in The People v Kelly [1982] IR 90 who said, at 109:

> "In my view, the matters to be considered are the requirements of justice on the particular facts of the case before the court. A late and stale complaint of irregularity with nothing to support it can be disposed of easily. Where there appears to be a possibility of injustice, of a mistrial or of evidence having been wrongly admitted or excluded, the absence of an earlier intention to appeal or delay in making the application or the conduct of the appellant should not prevent the court from acting. This seems to me to be the practical result of considering what the 'justice of the case may require'."

We were not persuaded that the appellant had established 'substantial grounds' for the delay. However, in the circumstances, we determined to hear submissions as to the merits of all three appeals against sentence.

[10] In terms of merit Mr Grant advanced two main submissions:

(a) That the sentence passed upon Richard Barry offended against the principle of "disparity" when compared with the sentence passed upon Martin Fleming. In support of that submission he referred the court to the

decisions in Bell and R v Delaney [1994] NIJB 31. Mr Grant argued that there had been no real difference in terms of culpability between the case of Mr Barry and Mr Fleming and that both had suffered equally from the delay in bringing the case to trial.

(b) Mr Grant also submitted that the sentence passed upon Richard Barry had been manifestly excessive and wrong in principle and he criticised the Learned Trial Judge for having regard to the decision in Attorney General's Reference [No.5 of 2004] Thomas Potts [2005] NIJB 204. Mr Grant argued that his long and relevant criminal record together with his clear paramilitary involvement placed Mr Potts in quite a different category from Mr Barry.

[11] Mr Ramsey also sought an extension of time in accordance with Section 16(2) of the 1980 Act in respect of the appeal of Mr Benson. He also relied upon the "disparity" principle and argued that, in the circumstances of this case, the disparity was not apparent until the Learned Trial Judge sentenced Mr Fleming and that, therefore, an extension should be granted. He also relied upon the difference between the sentence passed by the Learned Trial Judge upon Glenn Benson as compared to the sentence passed upon Martin Fleming. Mr Ramsey accepted that the Learned Trial Judge had carefully and conscientiously conducted a number of detailed enquiries in order to ensure that she had a comprehensive picture of Martin Fleming's personal circumstances before passing sentence. However, Mr Ramsey submitted that the Learned Trial Judge appeared to take the personal circumstances of Mr Fleming into account when determining the element of the sentence passed upon him that was to be served in custody, rather than overall length, and that there was no real justification for the difference of some 3 years between the overall sentences passed upon Martin Fleming and Glenn Benson.

[12] Mr Farrell conducted the appeal against sentence on behalf of Andrew McBride before this court submitting that the sentence of 7 years passed upon Andrew McBride was manifestly excessive and wrong in principle having regard to his involvement in the offence and the fact that he did not play a central or principal role. Mr Farrell referred to the fact that Andrew McBride had a clear criminal record, apart from some motoring offences, that he had not taken part in the planning or execution of the offence and that he had simply collected the envelopes containing money from Witness A without personally delivering any threats or menaces. Mr Farrell submitted that, given their respective roles, the court might have difficulty in seeing any real difference between the culpability of Andrew McBride and David Walsh.

Discussion

[13] In commencing a consideration of these sentences it is important to record that each of the appellants contested the prosecution case and that, consequently, none of them was entitled to any discount by way of a guilty plea.

[14] In the course of sentencing Martin Fleming there is no doubt that the Learned Trial Judge was aware of the seriousness of his behaviour. After referring to his initial assertion to Witness A, that he had been sent by the Glenburn UDA to obtain cannabis, the Learned Trial Judge continued in the following terms:

> "He (Martin Fleming) told Witness A that there was another person in his car and that he was a UDA scout who was writing down the registration number of his cars in the driveway so that if he went anywhere they would know exactly where he was. … Fleming then told Witness A that if he did not get any cannabis that Witness A was to pay a £10,000 fine or everything would be burnt. Witness A told the court that Fleming had a scowl on his face and pointed with his index finger at the car and bikes that were visible at his home, and told Witness A that all his 'little toys' would be burnt. Witness A told the court he was not 100 per cent sure of the exact words used, but said it was something like: 'See all your little toys here, they will be burnt and your house will be burnt as well.' Witness A asked where he was going to get £10,000 and was told by Fleming that he did not care, so long as Glenburn UDA got the £10,000. These are the bases of the threats that were made to Witness A, and at one point when Mr Fleming went down supposedly to collect money and witness A indicated that he could not have it, he was told he had better find it, and he was put on the phone to someone else. After being put on the phone on that occasion, Witness A left his house, started to live rough in his car for a period of time and told this court that he believed the threats were serious."

The Learned Trial Judge subsequently went on to record that Martin Fleming had then "dropped out of the picture" and that another group of people took over the blackmail. They would have included the appellants Barry and Benson. In pre-sentence exchanges with counsel the Learned Trial Judge recalled that Mr Barry had referred to Mr Fleming as a 'muppet' or "numpty" and she categorised him as 'down towards the foot soldier bracket'.

[15] In delivering the judgment of this court in R v Stewart [2009] NICA 4 Kerr LCJ specifically set out the correct principles to be applied when considering the disparity argument with a view to removing any misconceptions. After referring to a passage from the judgment of Gibson LJ in R v O'Neill [1984] 13 NIJB (2) the Learned Lord Chief Justice said at paragraph [22]:

> "[22] The principle expressed in this passage is quite clear. An appellant who has been properly sentenced

> cannot benefit from an inadequate sentence wrongly passed on a co-defendant. He cannot expect a reduction on his sentence solely on account of the unjustifiably lenient treatment of someone involved in the same offence. The fact that the 'sense of grievance' is unjustified is secondary to the primary import of the principle which is, as we have said, that a properly passed sentence cannot be altered because of an error in sentencing a co-accused."

[16] Kerr LCJ then proceeded to consider the statement that "right thinking members of the public looking at the respective sentences would say that something had gone wrong" as a test of disparity. Having done so, he said at paragraph [25]:

> "It is not unfair to an appellant who receives a perfectly proper sentence that a co-accused is punished less severely. It is therefore important to recognise that the two concepts of "something having gone wrong" and "unfairness to the appellant" are inextricably linked in this exercise. In this context, we should say that the degree of disparity does not inevitably supply the answer to the question "has there been unfairness to the appellant?" Some cases (such as Delaney and R v Murdoch [2003] NICA 21) suggest that a disparity in sentence will not be regarded as requiring to be redressed unless the difference in treatment is marked. One can understand that the question of unfairness to an appellant cannot arise where the disparity is less than marked but it does not follow that solely because the discrepancy is substantial, unfairness to an appellant will inevitably accrue."

[17] When determining the appropriate nature of the commensurate sentence in this case it is important to bear in mind the nature of the charges faced by each of the appellants. None of them was charged with membership of a terrorist organisation. Each was charged with the offence of blackmail the essential core of which is the unwarranted demand of money *with menaces* (our emphasis). In that context we bear in mind the perceptive observations of Kerr LCJ at paragraph [17] of the judgment of this court in the case of Potts with regard to the offence of blackmail in Northern Ireland when he said:

> "The presence of paramilitary organisations in our community and their criminal activities cause many people in Northern Ireland to feel vulnerable to pressure that is exerted overtly or *nominally* (our emphasis) on behalf of those organisations. More seriously than that,

> however, is the threat that paramilitaries in general and blackmail *carried out in their name* (our emphasis) particularly, pose to the peace and good order of society. The purpose of these organisations is to set up parallel and alternative structure to the institutions of the State. They are determined to undermine the rule of law. They seek to enforce their own code of conduct and to thwart the proper administration of justice. Crimes committed by paramilitary organisations or *ostensibly on their behalf* (our emphasis) must occupy a more serious category on that account."

At paragraph [19] the Learned Lord Chief Justice went on to observe:

> "[19] A further aspect of blackmail offences carried out on behalf of *or represented to be on behalf of paramilitary organisations* (our emphasis) is the natural reluctance of victims to alert the police to their occurrence. People are understandably afraid to reveal that they have become the targets of those who stand for paramilitary organisations. They are afraid to give evidence. The court must respond to this by imposing severe penalties where victims are prepared to testify so as to convey to those who might be tempted to perpetrate such crimes that the consequences will be, where they are detected and successfully prosecuted, a substantial penalty."

[18] In this case the threats and menaces were directed against specific individuals rather than commercial entities as in Potts and R v Lowey [2007] NICA 9. That should not necessarily be a reason for reducing the severity of a commensurate sentence. As far as Witness A and his partner were concerned they were being threatened by representatives of a violent criminal terrorist organisation. Indeed, if anything, the enquiries pursued by Witness A with people whom he believed "would have connections in the UDA" confirmed the reality of the danger so far as they were concerned. The Learned Trial Judge recorded that Witness A stated in evidence that he was:

> "Scared that his life was upside down and he and his partner left their home and slept in a car for 4 days because they were afraid to stay in their home."

The appellant Andrew McBride volunteered in the course of his interviews with the police that Witness A must have been "worried out of his mind".

[19] It would appear that, quite apart from his personal domestic circumstances, it was open to the Learned Trial Judge to distinguish between Martin Fleming and

Richard Barry and Glenn Benson with regard to length of sentence. In practical terms, the Crown recognised that there was a distinction to be made in terms of Martin Fleming's involvement by prosecuting him on a separate indictment thereby reflecting the escalation of threat and organisation represented by the advent of Barry and Benson. The existence of such a distinction appears to have been accepted by Richard Barry who, in the course of his tape recorded telephone calls to Witness A, referred to Martin Fleming as 'a muppet' who was 'not in the same league' and would be 'taken care of'. Nonetheless, if, as appears to have been the case, the Learned Trial Judge took his personal circumstances into account only when calculating the amount of time to be spent in custody, it does appear that Martin Fleming was treated leniently in receiving a sentence of 5 years' imprisonment. However, as Kerr LCJ pointed out in giving the judgment of this court in Stewart, the passing of an unjustifiably lenient sentence upon a co-accused cannot benefit an appellant who has otherwise been properly sentenced. After giving the matter careful reflection, we have not been persuaded that the sentences passed by the Learned Trial Judge upon Richard Barry or Glenn Benson are either manifestly excessive or wrong in principle and, accordingly, their appeals must be dismissed.

[20] We have also given careful consideration to the appeal of Andrew McBride upon whom the Learned Trial Judge imposed a sentence of 7 years' imprisonment. Mr Farrell drew the attention of the court to a number of relevant factors including:

(i) Apart from some motoring convictions, the appellant had a clear record.

(ii) There was no evidence that this appellant was involved in the planning or organisation of the blackmail operation or that he personally was responsible for any threat against Witness A or Witness B. His role was simply limited to that of collecting the envelopes.

(iii) If anything, McBride's role had been closer to that of the accused Walsh who had driven Andrew McBride to the McDonald's car park in Newtownards to collect an envelope from Witness A upon one occasion.

[21] It is to be noted that in opening his remarks on behalf of the PPS to the Learned Trial Judge at the commencement of the sentencing hearing Mr Mateer suggested that the best way of drawing any distinction between the five accused might be in relation to Walsh who was the vehicle driver and McBride as the collector of the money from time to time. He went on to say:

> "They may perhaps be properly regarded as some degree of lesser culpability in this overall plan, but they did lend themselves to exactly the same enterprise."

David Walsh suffered from learning difficulties and a medical report was produced to confirm that his cognitive ability was in the bottom one per cent of the population. He had a very limited criminal record with a substantial gap between 1997 and 2007.

In sentencing David Walsh the Learned Trial Judge observed that she was passing a sentence of 5 years "… primarily for the reason that the prosecution have indicated that there is a difference to be made in your case and indeed your case was the least strong".

[22] We have given careful consideration to the appeal against sentence by Mr McBride. While there were identifiable differences between his case and that of David Walsh both in terms of frequency of involvement and personal circumstances, we are not persuaded that such differences justified a 40 per cent increase in sentence in respect of Andrew McBride and, accordingly, we propose to reduce the sentence to which he is subject to one of 6 years. Accordingly, his appeal will be allowed to that extent.